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No. 81-2343

In the Supreme Court of the United States

October Term, 1981

JOHN W. SHOEMAKER, Chief,
Ohio Adult Parole Authority,
Petitioner,

vs.

JOSEPH RILEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER A STATE PRISONER HAS BEEN DEPRIVED OF A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS FOURTH AMENDMENT CLAIM WHERE THE STATE COURT OF APPEALS DENIES SAID CLAIM AND REFUSES TO CONSIDER THE MERITS THEREOF FOR REASONS THAT WERE NEVER LITIGATED IN THE COURT BELOW IN DIRECT CONTRAVENTION OF STATE PROCEDURAL REQUIREMENTS AND A CONTROLLING DECISION OF THE UNITED STATES SUPREME COURT?

II. WHETHER LAW ENFORCEMENT OFFICERS COULD POSSIBLY HAVE BEEN ACTING IN GOOD FAITH WHERE THEY MADE THREE (3) WARRANTLESS ENTRIES INTO A HOME BASED UPON "CONSENT" OBTAINED FROM A PERSON WHO HAD JUST SHOT THE HOMEOWNER WHERE THE OFFICERS MADE NO ATTEMPT TO INQUIRE AS TO THE EXTENT OF THAT PERSON'S AUTHORITY OR CONTROL OVER THE PREMISES, AND WHERE THAT PERSON HAD NO ACTUAL AUTHORITY TO GIVE SUCH CONSENT?

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Ohio Adult Parole Authority,
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On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

In addition to those decisions set forth in the Petition for a Writ of Certiorari, the Paulding, Ohio, Court of Common Pleas issued a decision denying Respondent's pre-trial motion to suppress in the form of a letter to counsel dated February 15, 1977 (A - 1).

STATUTES INVOLVED

In addition to the constitutional provisions set forth in the Petition for a Writ of Certiorari, this case involves 28 U.S.C. Section 2254: State custody; remedies in Federal Courts. The verbatim text of this statute is reproduced in the Appendix.

STATEMENT OF THE CASE

Respondent, Joseph Riley, would initially point out that the charge of carrying a concealed weapon (a violation of Ohio Revised Code Section 2923.12) was not dismissed prior to trial, contrary to what is asserted in the Petition for Certiorari. Rather, Riley was acquitted when the jury found him not guilty of that charge.

The operative facts are not in dispute. On September 29, 1976, the Paulding, Ohio, Village Police were called to the entrance of a tavern known as the Red Owl Inn to investigate the report of a shooting. Officer Walter Heinrichs found Joseph Riley lying in the front doorway, bleeding from a gunshot wound. At the direction of the tavern owner, Officer Heinrichs proceeded to the lavatory where he found Mr. James Christian vomiting in one of the stalls. Christian was pale, perspiring and visibly shaken when he emerged from the stall. Upon being questioned by the officer, he explained that he had shot Riley by accident in the apartment next door. Officer Heinrichs then demanded to see the gun that had been used.

At the officer's insistence, Mr. Christian led Heinrichs to an apartment on the second floor of the building next door to the tavern. The only entrance was locked. At the suppression hearing held before the Court of Common Pleas of Paulding County, Ohio, Heinrichs testified that

Christian voluntarily unlocked the apartment door and invited him to enter the premises. At trial, however, Officer Heinrichs admitted that Christian was so nervous and emotionally distraught that he took the keys away from Christian and opened the door himself. At the evidentiary hearing held before the United States District Court for the Northern District of Ohio, Western Division, Heinrichs' story was that Christian's hands were shaking so badly that Christian handed Heinrichs the key and asked him to open the door. In any event, there was no evidence adduced at any stage of the proceedings indicating that Christian had authority to give the police permission to enter, or that the police made any inquiry in that regard.

James Christian did not testify at the state court suppression hearing or at the trial on the advice of his counsel. He did, however, testify before the district court. His testimony was that Officer Heinrichs had asked him if he had a key to the apartment. Christian responded that he had Riley's keys. The officer then demanded the keys and proceeded to unlock the apartment door.

After unlocking the door, Officer Heinrichs stepped into the apartment and observed a revolver lying on a table a few feet inside of the apartment. He then left the premises and locked the door behind him, confiscating the keys.

By this time, Chief of Police, Charles Watson had arrived at the scene. Pursuant to his orders, officers entered the apartment for a second time to look at the weapon involved and also observed blood on the carpet. At this point, the Chief ordered his men to send for the mobile evidence van maintained by the Paulding County Sheriff's Department so they could "process the crime scene."

After the evidence van arrived, the officers entered the apartment for the third time and began a general search of the premises. No effort was made to obtain a search warrant, although there were at least five (5) officers present at the time and the premises had been secured.

During the state court suppression hearing, Deputy Dave Harrow, who was directing the collection of evidence, explained that "There was no need for a warrant. It was a crime scene." At the District Court evidentiary hearing, Harrow was again asked about the procedures followed. He explained that it never occurred to him to get a search warrant, "because it was a shooting and I was just going to process the crime scene."

After spending no less than two (2) hours in Riley's apartment "processing the crime scene" the officers discovered guns and a quantity of controlled substances. At that point the officers decided to obtain a search warrant. The officers then left the apartment, locked it behind them, and posted a guard at the door. They returned with a warrant to search the "premises believed to be occupied and/or controlled by one Joe Riley". During this fourth entry the officers seized the weapons and controlled substances which they had previously discovered during their third warrantless intrusion into Riley's home.

It is undisputed that Riley never gave consent for the police to enter his apartment. Further, there is nothing in the record of the state court proceedings indicating that Christian had come into possession of Riley's apartment keys with Riley's knowledge or consent. At the district court evidentiary hearing, it was established that Riley lived alone in his apartment and that he had never entrusted keys to anyone. After Riley had been shot, Christian and another companion helped Riley out of the

apartment, and brought him downstairs to the tavern next door. As they left, Christian picked up the apartment keys from the same table where he left the gun. It is undisputed that Riley had never given his keys to Christian, and there was no evidence presented at any time which indicated that Christian was authorized to have access to Riley's apartment.

The Paulding County Court of Common Pleas denied Riley's motion to suppress holding that the three (3) warrantless entries into Riley's apartment were justified because ". . . Defendant (Riley) had been seriously wounded by a shot from a .357 Magnum revolver in circumstances, the legitimacy of which could not be presumed. . ." and because of the fact that there had been a violation of Ordinance 484 of the Village of Paulding which prohibits the discharge of a firearm within the Village territorial limits (A - 1).

The case proceeded to jury trial on one count each of Aggravated Trafficking (Ohio Revised Code, Section 2925.03), Trafficking in Marijuana (Ohio Revised Code, Section 2925.03 (a) (6)), Drug Abuse (Ohio Revised Code, Section 2925.11 (A)) and Carrying a Concealed Weapon (Ohio Revised Code, Section 2923.12). Riley was found not guilty of the weapons charge and convicted on the drug offenses.

The conviction was appealed to the Court of Appeals for Paulding County, which is in the Third Appellate District of Ohio. On appeal the decision of the trial court was affirmed without the merits of Riley's Fourth Amendment claim having been addressed. Although possession was a material element of each offense for which Riley was convicted, and despite the fact that the prosecution never challenged Riley's standing to move to suppress at any point in any of the state court proceedings, the

Court of Appeals held, *sua sponte*, that Riley did not have standing to litigate the merits of the Fourth Amendment issues arising out of the warrantless search of his home. In so holding, the court reasoned that since there was ". . . no proof whatsoever that the defendant had any ownership or possessory interest in the apartment, where the seized articles were found, he has not proved any standing to have their use in evidence suppressed. . ." (PA - 34).

Although the Court of Appeals did mention that the search might possibly be justified on the basis of the alleged consent obtained from Christian, who, the court said, "exercised some dominion over the apartment" it did not so hold (PA - 34). Indeed, it would not have been possible for the court to hold that a valid consent had been given, since the state court record was devoid of any evidence to support the contention that Christian exercised any "dominion" whatsoever over Riley's apartment.

After exhausting his remedies under state law, Riley filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio, Western Division. The Petitioner herein filed a return of writ contending, in essence, that consideration of his claim was foreclosed by this court's holding in *Stone v. Powell*, 428 U.S. 465 (1976). On January 9, 1980, the magistrate issued a memorandum and order holding that consideration of Riley's Fourth Amendment claim was not barred by *Stone*, as Riley had not been afforded a full and fair opportunity to litigate his Fourth Amendment claims in the state courts (PA - 17-18).

On August 12, 1980 an evidentiary hearing was held before the district court. The Petitioner contends that this hearing was "the first time" any evidence was adduced

to indicate that James Christian had no authority to consent to the search of Riley's home. However, the prosecution has the burden of establishing the validity of any consent to search and no evidence was ever adduced in the state court proceedings to establish Christian's authority in this regard.

On September 5, 1980, the district court issued an opinion and order denying Riley's petition. From a perusal of that opinion, its was obvious that the district court had misapprehended the facts and Riley made a timely motion for reconsideration on that basis. On January 22, 1981 the district court granted the motion for reconsideration and issued a new opinion and order based upon the actual facts of the case. In its opinion, the district court reasoned as follows:

> "Thus there is no 'crime scene' exception which would justify the warrantless search in this case. The first entry can be justified on the emergency exception to the warrant requirement. However, a warrantless search must be limited to only the exigencies upon which it is based. Certainly after the second entry it was clear that there were no other victims or assailants in the apartment. The person who shot petitioner was known and was being detained by the police. There was no indication that evidence would be removed or destroyed, and there were plenty of officers present to guard the apartment until a search warrant could be obtained. Therefore, the third entry and search, in which the narcotics were discovered, was impermissible under *Mincey*."

The district court also rejected the contention that the warrantless searches of Riley's apartment could be justified on the basis of consent, in accordance with the well-

established rule that apparent authority to consent to a search is not sufficient where actual authority is lacking.

Petitioner herein appealed to the United States Court of Appeals for the Sixth Circuit from the judgment granting Riley's petition for a Writ of Habeas Corpus. In affirming the judgment of the district court, the Court of Appeals held that Riley had been denied an opportunity to litigate the issue of his standing to move to suppress in the state courts, as the parties had never briefed or argued the question in the state appellate court and the prosecution had waived any possible objection to Riley's lack of standing by failing to make an objection in the trial court, as required by state law. Had the point been raised by the prosecution at the pre-trial suppression hearing (as required by state law), it is clear from the record of the trial that Riley could easily have proved his standing to challenge the constitutionality of the warrantless search of his home (PA - 8-10).

The Court of Appeals also rejected the contention that the officers involved acted in good faith, holding that since the officers did not know who lived in the apartment and made no inquiry of Christian in that regard, their subjective belief that Christian had authority to give such consent was not reasonable under the circumstances. In so holding, the Court of Appeals reasoned as follows:

> ". . . the extent of Christian's dominion over the apartment was vital to his capacity to consent to the search. The failure of the police to inquire into that subject is unreasonable. If we were to hold that his course of conduct supports an objectively reasonable belief, then we would, in effect, be condoning deprivations of constitutional rights which are the result of negligent police conduct. Moreover, if we hold that the police had a reasonable belief, we would, in effect, encourage

the police to avoid inquiring into the facts of the situation. The exclusionary rule is designed to deter negligent, as well as wilful, deprivations of constitutional rights. *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). Therefore, failure to suppress evidence which is improperly obtained primarily because the police failed to inquire and ascertain the operative facts would be inconsistent with the deterrent purpose of the exclusionary rule." (PA - 13)

This case was affirmed on March 22, 1982, and was thereafter appealed to this honorable court.

REASONS WHY THE WRIT SHOULD BE DENIED

I. REVIEW OF A FOURTH AMENDMENT CLAIM IN A HABEAS CORPUS PROCEEDING IS NOT PRECLUDED WHERE THE STATE PRISONER WAS DENIED A FULL AND FAIR OPPORTUNITY TO LITIGATE THAT CLAIM IN THE STATE COURTS

This case presents no issues of major significance to Fourth Amendment jurisprudence or the administration of criminal justice as a whole. The Court of Appeals made a proper application of *Stone v. Powell* and correctly decided that Riley had been deprived of a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. *Stone*, of course, bars the litigation of Fourth Amendment claims in proceedings brought pursuant to 28 U.S.C. Section 2254 where the state prisoner has been afforded a full and fair opportunity to fully and fairly litigate those claims in the state courts. *Id.*, 428 U.S. at 494.

Where a prisoner has been denied a full and fair opportunity to litigate his Fourth Amendment claims at trial and on direct appeal, *Stone v. Powell, supra* does not operate to bar consideration of the claim in a habeas corpus proceeding *Id.*, 428 U.S. at 494, n.37:

> "We hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim, absent a showing that the state prisoner was denied an opportunity for a full and fair litigation on that claim at trial and on direct review."

It is well established that the exclusionary rule is not coextensive with the Fourth Amendment. The requirements of the Fourth Amendment include an opportunity for a full and fair hearing on issues relevant to a deprivation of Fourth Amendment rights. *Franks v. Delaware*, 438 U.S. 154, 171-172 (1978). In the case at bar, the Court of Appeals found that Riley had been unlawfully deprived of an opportunity to present his Fourth Amendment claim, and that he would have prevailed upon the merits had he been afforded a proper opportunity to litigate the issues.

In Ohio, the prosecution must object to an accused's standing to make a motion to suppress, or the issue is waived. *State v. Morris*, 42 Ohio St. 2d 307, 329 N.E.2d 85 (1975), Syllabus #1. The case at bar was squarely within the "automatic" standing rule of *Jones v. United States*, 362 U.S. 257 (1960), which was the law at all times during the state court proceedings. In understandable reliance upon *Jones*, Riley did not present any evidence of standing at the suppression hearing. The prosecution never objected, as it was clear that Riley could have easily established his standing. On direct appeal, the standing issue was not briefed or argued by either party. The Court of Appeals, however, held, *sua sponte*, that Riley lacked

standing to contest the search of his home and refused to address the merits of Riley's Fourth Amendment claim. In so holding, the Court of Appeals did not mention or consider *Jones v. United States* or *State v. Morris, supra.*

The Sixth Circuit Court of Appeals found that the Court of Appeals deprived Riley of an opportunity to litigate the standing question. Had Riley ever been afforded a hearing on that issue, he could have easily established his standing to move to suppress. At trial, Officer Keith Baird testified that the premises searched were rented by Riley, and that "it was pretty common knowledge where he lived for the last year." At that time, Riley was justified in relying upon *Jones, see, Linkletter v. Walker,* 481 U.S. 618 (1965), and could easily have met any objection under *Morris* had there been a need to do so. By giving no consideration whatever to controlling case law, the Court of Appeals completely frustrated Riley in his attempt to litigate his Fourth Amendment claim. Riley was effectively denied any hearing on the standing issue and the state appellate court gave no consideration to the merits of his Fourth Amendment claim. This is not a case where the state court simply made an erroneous interpretation of the substantive law.

The Sixth Circuit Court of Appeals made a proper and just application of *Stone v. Powell, supra,* in this case, and its interpretation of that case is neither illogical nor extreme. Where an accused is prevented from making a full presentation of his Fourth Amendment claim because of an unforseeable and unlawful application of a procedural rule, *Stone v. Powell, supra,* does not bar habeas corpus relief.

Other circuit courts have made considerably narrower interpretations of *Stone v. Powell, supra, see, Gamble v. Oklahoma,* 583 F.2d 1161 (10th Cir. 1978); *Pulver v. Cun-*

ningham, 562 F.2d 198 (2nd Cir. 1977), *see also Mack v. Cupp*, 564 F.2d 898, 900 (9th Cir. 1977) (dicta). One circuit court has given *Stone* a more expansive reading than the language of that decision can logically support. *See Williams v. Brown*, 609 F.2d 2161 (5th Cir. 1980). But other cases are squarely in accord with the decision in the case at bar, *see, Boyd v. Mintz*, 631 F.2d 247, 250 (3rd Cir. 1980); *Gates v. Henderson*, 568 F.2d 830, 840 (2nd Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 1038 (1978), *see also, Moore v. Cowan*, 560 F.2d 1298, 1301-1302 (6th Cir. 1977). The Sixth Circuit Court of Appeals has not made any novel or extreme interpretation of the law, nor has it undertaken a sharp break with precedent in its disposition of the instant case.

For these reasons, it is difficult to perceive that any issue of national significance is presented herein. Accordingly, Respondent respectfully submits that the Petition for Certiorari should be denied.

II. REGARDLESS OF WHETHER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD EXIST, THE ACTIONS OF THE LAW ENFORCEMENT OFFICERS IN THE CASE AT BAR WERE NOT REASONABLE UNDER THE CIRCUMSTANCE AND THEREFORE CANNOT BE JUSTIFIED AS HAVING BEEN UNDERTAKEN IN GOOD FAITH

Respondent does not concede that there should be a so-called good faith exception to the exclusionary rule. However, even if it is assumed, *arguendo*, that such an exception should be found to exist, there is no indication that the police acted with a reasonable, objective, good faith belief in the propriety of their actions in the case at bar.

For the concept of a "good faith" exception to the exclusionary rule to have any validity, the actions of the officers involved must be objectively reasonable. Subjective good faith alone cannot be sufficient, as the police would then, in effect, be rewarded for their negligence or their ignorance of the law. *See, United States v. Williams*, 622 F.2d 830, 848 (5th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 1127 (1981). The exclusionary rule, historically, has been held to deter negligent, as well as wilful, deprivations of constitutional rights. *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). The question of law enforcement officers' good faith has most often been discussed in connection with technical questions, unrelated to the actual conduct of the officers such as whether evidence seized pursuant to an arrest for violation of a statute later found to be unconstitutional should be suppressed. *See, e.g. Michigan v. DeFillippo*, 443 U.S. 31 (1979). *United States v. Reltien*, 422 U.S. 531 (1975), or whether a reasonable and apparently lawful arrest was effectuated beyond the scope of the officers' jurisdiction or authority. *See, e.g. United States v. Williams, supra, United States v. Wilson*, 528 F. Supp. 1129 (S.D. Fla. 1982). Under such circumstances, the actions of the officers are justifiable under the law and by the facts as perceived by them. Accordingly, their actions are objectively reasonable and do not constitute wilful or negligent transgressions of constitutional rights.

In such situations, the actions of the officers appear to be authorized by law and are found to be improper only subsequently and then only in a technical sense. In *Michigan v. DeFillippo, supra*, however, this court made it clear that an arrest made pursuant to a "law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws" or a law which

"violated a controlling precedent" establishing its unconstitutionality would nevertheless require suppression of any evidence seized. *Id.*, 443 U.S. at 38.

Thus, where law enforcement officers act negligently, or out of sheer ignorance, their subjective good faith will not vitiate the application of the exclusionary rule. Where the conduct of law enforcement officers is objectively reasonable and it is apparent that they acted with an informed good faith belief in the propriety of their actions, a different case is presented; but that is not the case at bar.

In the instant case, the officers' belief that they were entitled to rely upon Christian's implicit consent to search Riley's apartment was manifestly unreasonable. Although Christian was in possession of Riley's keys, it must be remembered that Christian had just shot and seriously wounded Riley "under circumstances the legitimacy of which could not be presumed" (A - 1). Accordingly, the police could not reasonably presume that Christian had come into possession of Riley's keys, in a legitimate manner.

The officers who first arrived at the scene all testified that they did not know whose apartment this was, and they all admitted that no inquiry was made in that regard. Deputy Harrow (the evidence technician) was unaware that any consent had been given at all. He assumed that no search warrant was necessary because a "crime scene" was involved—there is, of course, no "crime scene" exception to the warrant requirement *Mincey v. Arizona*, 437 U.S. 385 (1978).

To hold that these officers were acting in good faith under these circumstances would be to sanction negligence and ignorance.

The burden was upon the officers to inquire as to the extent of Christian's dominion over the apartment. *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Matlock*, 415 U.S. 164 (1974). Just because the man who shoots a person may have taken that person's keys does not reasonably support the conclusion that he came into possession of the keys with that person's knowledge or consent. Common sense would place an ordinary man on inquiry as to the extent of the man's authority to give consent for a search of the premises, and the law places upon a police officer the duty to make such an inquiry. Further, given that Christian was distraught to the point of physical illness, it is not clear that he even had the capacity to give a knowing and voluntary consent to anything, even if it is assumed that he had the actual authority to do so. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

It is of material significance that we are dealing with a search of a man's home, where his reasonable expectation of privacy is at its zenith. *Payton v. New York*, 445 U.S. 573, 589-590 (1980). A search warrant should have been obtained before a full-scale "processing of the crime scene" was undertaken and it is reasonable to expect the officers to have done so. Prior to their third warrantless entry into Riley's apartment, the police had already checked the apartment for other victims or assailants and found none. They had already secured the apartment by locking the only door and could have as easily posted a guard, since no less than five (5) officers were present. They had absolutely no reason to believe that any evidence would be lost or destroyed. Further the person who shot Riley was already in custody and Riley himself was in the hospital in critical condition. Under such circumstances a warrant was clearly required, *Mincey v. Arizona*, *supra*, and could

have been easily obtained. Indeed, that would have been the reasonable thing for the officers to have done, and there was no objective or reasonable justification for their not doing so.

Under the totality of the circumstances, the officers' subjective assumption that Christian had authority to consent to a search of the apartment was unreasonable and unjustified. The officers' failure to make any inquiry as to the extent of Christian's dominion over the apartment was negligent, and the objective circumstances do not logically support the contention that the officers' actions were undertaken in good faith.

This is not a case involving a hypertechnical *post-hoc* application of the law which frustrates manifestly reasonable police conduct. This case involves negligent police conduct, ignorance of the law, and generally sloppy police-work, all which resulted in a violation of Respondent's constitutional rights in a situation where Respondent had the maximum reasonable expectation of privacy.

If a good faith exception to the exclusionary rule should exist, it would not be applicable to this case. To hold otherwise would be to sanction negligence, reward ignorance and encourage misfeasance. Such a result would not have support in law or logic.

For these reasons, Respondent respectfully contends that this case is a most inappropriate vehicle through which to consider the necessity for a good faith exception to the exclusionary rule. Accordingly, the petition for a writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should not be granted.

WHEREFORE, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

Letter Dated 2/15/77 from the Honorable J. Gareth Hitchcock to Counsel Containing the Decision of the Paulding County Court of Common Pleas

COURT OF COMMON PLEAS
PAULDING COUNTY
PAULDING, OHIO
45879

J. GARETH HITCHCOCK
JUDGE

Telephone
419-399-2811

February 15, 1977

Ralph DeNune III, Esquire
DeNune, Douglas & Bayford
Attorneys at Law
4334 West Central Avenue
Toledo, OH 43615

Re: State of Ohio vs. Joseph Riley
CR-76-569

Dear Mr. DeNune:

The court finds that the defendant Riley's motion to suppress should be overruled. The reasons are that the officer obtained the information by observation from a place he was entitled to be. There is no doubt that defendant was seriously wounded by a shot from a .357 magnum revolver in circumstances the legitimacy of which could not be presumed because of (1) the inherent danger to life and limb and (2) the fact that Ordinance 484 of the Village of Paulding provides:

"Section 1. It shall be unlawful for any person within the corporate limits of the Village of Paulding, Ohio, to discharge any gun, firearm, air rifle, air gun or compressed air gun without first obtaining a permit so to do from the Mayor of the Village of Paulding.

"* * *

"Section 3. Any person found guilty of violating any part of the provisions of this Ordinance shall be fined not less than $1.00 nor more than $100.00 for each separate offense.

"* * *."

Moreover, consent to observe the scene may be inferred from the voluntary surrender of the key to the premises where the shooting occurred to Chief of Police Watson by James Christian. And, particularly in view of the power of a .357 magnum, it is reasonable to trace the trajectory of the bullet by observing the holes made by the firing of a cartridge therefrom, as proof of such fact often is of critical importance in determining whether or not a gunshot has criminal significance.

Consequently, the court finds that Officer Harrow had a right to be where he was when observing in plain view objects referred to in his search warrant testimony.

The court is appreciative of all the citations brought to the court's attention by counsel, to-wit:

1. 403 US 443, 91A SCt 2022, 2038-39. Warrant not obtained from neutral magistrate.

2. 394 FS 1257. Observations made at investigation of shooting.

3. 38 OS2d 237. Evidence obtained outside scope of warrant can't be used.

4. 47 Oh Misc 1. Warrant usually required. Note Syl P2 (2) (5) (6).

5. 365 US 610, 81 SCt 776. No warrant conviction reversed.

6. 333 US 10, 68 SCt 367. No warrant conviction reversed.

7. 399 US 30, 90A SCt 1969. Warrant conviction reversed.

8. 413 US 496, 93A SCt 2796. Re warrant for obscene material.

The court has considered all of them in reaching its decision. A copy of this letter and the journal entry overruling the motion is, of course, being mailed to opposing counsel; also to all counsel of record in Causes No. CR-76-568 and CR-76-570.

With kindest personal regards, I am,

Very truly yours,

/s/ J. GARETH HITCHCOCK
Judge

JGH/ac

Enc.

cc: James P. Spriggs, Esq.
Roy Daniel Chinnis, Esq.
Hon. J. David Webb, P.A.

28 U.S.C. Section 2254

§ 2254 State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs

numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.